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YONG TOI MEE & ANOR v. MALPAC HOLDINGS BHD & ORS (NO 2)

HIGH COURT MALAYA, KUALA LUMPUR
MOHD NAZLAN GHAZALI J
[WRIT SUMMON NO: WA-22NCC-326-09-2016]
B 13 FEBRUARY 2018

CIVIL PROCEDURE: *Execution – Judgment – Application to release payment of judgment obtained – Whether there were sufficient monies in court – Whether payment ought to be made – Whether there was application for stay of proceedings* C *– Proper exercise of right of judgment creditor – Whether court was correct forum for payment out application – Rules of Court 2012, O. 49 r. 9*

The present application concerned two suits, namely (i) an Ipoh High Court civil suit ('suit 109') where judgment was given in favour of the plaintiffs; and (ii) a Kuala Lumpur High Court civil suit ('suit 326') which involved D issues arising from the same subject matter in suit 109. In suit 109, the plaintiffs paid RM49 million into the court for the benefit of the second defendant. In suit 326, the defendants were ordered to pay a sum of RM30,485,678.38 and this judgment had not been satisfied and there was no stay of execution against it. A day after the decision in suit 326 was E delivered, the second defendant, by way of an application in suit 109, sought payment out of the court of the said RM49 million. According to the defendants, the application sought to release the sum of RM49 million to the second defendant's solicitors on terms of release which took into account the pending appeals. This led to the filing of the present application by the F plaintiffs, pursuant to O. 49 r. 9 of the Rules of Court 2012 ('the ROC') for orders (i) that the monies in the Ipoh High Court and standing to the credit of the second defendant be sufficient in full or in part of the judgment of the court in suit 326 for the sum of RM30,458,678.38; and (ii) directing that the payment out of the said monies in court be paid to the solicitors for the G plaintiffs. Objecting against the application, the second defendant argued that the plaintiffs should have agreed to the second defendant's own application for payment out of court at the Ipoh High Court. The issues that arose for the court's adjudication were (i) the true nature of the defendant objection and of its application in the Ipoh High Court; (ii) the proper exercise of right of judgment creditor; and (iii) whether the present court was the correct forum H for the payment out application.

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Held (allowing application):

(1) The plaintiffs could not execute judgment because the monies, to the extent which they were entitled to in suit 326, would, under the terms of the consent order, be placed in their solicitors' account pending the disposal of the appeals, including against the decision in suit 326. This was clearly an attempt by the defendants to achieve a stay of execution in suit 326 by the backdoor, when, in fact, there was no stay against the judgment in suit 326. There was no application filed for a stay by the defendants. The court could not assist a party who was content to pursue its rights in a fashion that bordered on an abuse of the court's process. (paras 17 & 18)

(2) The plaintiffs were merely exercising their right to have the judgment, granted in their favour, satisfied. There was sufficient money in court which stood to the credit of the second defendant, being the judgment debtor, for the plaintiffs to 'attach' under O. 49 r. 9 of the ROC. The plaintiffs' pursuit of the instant application to execute the judgment, by resorting to O. 49 r. 9 of the ROC, was entirely valid and proper exercise of its right as a judgment creditor. (para 23)

(3) Order 49 r. 9 of the ROC could be justifiably invoked by the plaintiffs to seek the satisfaction of the judgment granted in suit 326, given the refusal of the second defendant to make payment to the plaintiffs on the basis of the judgment, from the monies belonging to the judgment debtor now in court by virtue of the payment into court in suit 109, by applying for an order of this court, authorising the payment out of the same, out of the monies paid into the court in suit 109. The application was correctly filed before this court for this was also the court which granted judgment in Suit 326 sought to be executed by the plaintiffs. Any application for an attachment of monies paid into a different court may rightly be made to the court which granted judgment that gave rise to the execution for it established, by virtue of the verdict, the status of a judgment creditor for the winning party who then became entitled to have the judgment executed, if not earlier satisfied by the judgment debtor. There should not be any undue restrictions as to which court ought to have that jurisdiction under O. 49 r. 9 of the ROC. (paras 30-32)

Case(s) referred to:

Brereton v. Edward [1888] 21 QBD 488 ***(refd)***

Emmott v. Michael Wilson & Partners Ltd [2017] EWCA Civ 367 ***(refd)***

Malpac Capital Sdn Bhd v. Yong Toi Mee & Ors And Another Appeal [2016] 8 CLJ 613 CA ***(refd)***

Wee Choo Keong v. MBf Holdings Bhd & Anor And Another Appeal [1993] 3 CLJ 210 SC ***(refd)***

A *Yong Toi Mee & Anor v. Malpac Capital Sdn Bhd & Anor [2013] 8 CLJ 725 FC* ***(refd)***
Yong Toi Mee & Anor v. Malpac Holdings Bhd & Ors [2018] 5 CLJ 619 HC ***(refd)***

Legislation referred to:
Rules of Court 2012, O. 49 rr. 2, 9(4), O. 90 rr. 8(2), 9

B *For the plaintiffs - P Gananathan, Olivia Loh, Ng Choo Beng & Yeoh Kai Ying; M/s Ng Choo Beng R Naidu & Partners*
For the 2nd defendant - SH Leong; M/s Leong & Partners

Reported by Najib Tamby

JUDGMENT

C **Mohd Nazlan Ghazali J:**

Introduction

[1] This is an application by the plaintiffs, documented in encl. 90, for monies that had been deposited into the Ipoh High Court by the second D defendant in earlier proceedings be ordered to be paid to the plaintiffs in satisfaction of the judgment entered against the defendants in a related suit.

[2] At the conclusion of the hearing, I allowed the application and stated the key reasons for the same. This judgment contains the full reasons for my decision.

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Key Background Facts

[3] There is a fairly long history of litigious dispute between the parties herein. For present purposes however, I need to refer to only two of such suits.

F **[4]** The first is the Ipoh High Court Civil Suit No. 22-109-2007 ("suit 109"). Litigated all the way to the Federal Court, judgment was given in favour of the plaintiffs (see the Federal Court decision in *Yong Toi Mee & Anor v. Malpac Capital Sdn Bhd & Anor* [2013] 8 CLJ 725). Notwithstanding, various supplementary applications had also been subsequently made in G respect of the judgment. This suit 109 has ended with the refusal of leave for certain of the defendants herein to appeal to the Federal Court against the decision of the Court of Appeal on the supplementary orders applications. The decision of the Court of Appeal may be found in *Malpac Capital Sdn Bhd v. Yong Toi Mee & Ors And Another Appeal* [2016] 8 CLJ 613.

H **[5]** The second proceeding is a claim for damages for the torts of abuse of process and conspiracy against the defendants filed in Kuala Lumpur High Court Suit No. WA-22NCC-326-09-2016 ("suit 326"), which concerned issues arising from the same subject matter in suit 109. I had ruled suit 326

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for the plaintiffs. The decision, which is pending appeal, may be found in *Yong Toi Mee & Anor v. Malpac Holdings Bhd & Ors* [2018] 5 CLJ 619; [2017] MLJU 1674. The instant application is made under this suit 326.

[6] The decision in suit 326 was given on 31 May 2017, which ordered payment by the defendants to the plaintiffs of the sum of RM30,485,678.38 together with interest at the rate of 5% per annum from 31 May 2017. Two points of importance in this regard are first, this judgment has not been satisfied, and secondly, there is no stay of execution against the judgment.

[7] Much earlier, in respect of the suit 109, the plaintiffs had on 26 February 2015, pursuant to an order of court dated 17 February 2015, made payment into court of a sum of RM49 million (in satisfaction of the relevant purchase subject to the suit 109) for the benefit of the second defendant.

[8] A day after I delivered decision on the suit 326, on 1 June 2017, the second defendant by way of an application in suit 109 filed an application at the Ipoh High Court seeking the payment out of court of the said sum of RM49 million. It is the contention of the defendants that the said application in essence sought to release the said sum of RM49 million (together with interest earned) to the second defendant's solicitors on terms of release which take into account the pending appeals. The defendants also stated that they were seeking the plaintiffs' cooperation on the release. That application by the second defendant is pending hearing at the Ipoh High Court at the time I heard the instant application before me.

[9] This then led to the plaintiffs taking out the instant application on 19 July 2017 in suit 326 instead, seeking in essence, the following reliefs:

(a) an order that the monies in the Ipoh High Court and standing to the credit of the second defendant be sufficient to satisfy in full or in part the judgment of this court in suit 326 for the sum of RM30,458,678.38 together with interest; and

(b) an order directing that the payment out of the said monies in court be paid to the solicitors for the plaintiffs.

[10] This application is opposed by the second defendant. I shall next consider the arguments of the litigants and make my findings on relevant issues arising therefrom.

Evaluation And Findings Of This Court

[11] The plaintiffs' instant application is premised on O. 49 r. 9 of the Rules of Court 2012 ("the RC 2012"). Order 49 concerns garnishment proceedings, but also provides for the attachment of the monies already paid into court standing to the credit of the judgment debtor, in satisfaction of a judgment. Order 49 r. 9 reads as follows:

9. Money in Court (O. 49 r. 9)

(1) Where money is standing to the credit of the judgment debtor in Court, the judgment creditor shall not be entitled to take garnishee proceedings in respect of that money but may apply to the Court by a notice of application for an order that the money or so much thereof as is sufficient to satisfy the judgment or order sought to be enforced and the costs of the application be paid to the judgment creditor.

(2) On issuing a notice of application under this rule, the applicant shall produce the application at the office of the Accountant General and leave a copy at that office, and the money to which the application relates shall not be paid out of Court until after the determination of the application. If the application is dismissed, the applicant shall give notice of that fact to the Accountant General.

(3) Unless the Court otherwise directs, the notice of application shall be served on the judgment debtor at least seven days before the day named therein for the hearing of it.

(4) Subject to Order 70, rule 23, the Court hearing an application under this rule may make such order with respect to the money in Court as it thinks just.

[12] The primary prerequisite to the application of the provisions of O. 49 r. 9 is the existence of monies standing to the credit of the judgment debtor in court. The RM49,000,000 does stand to the credit of the second defendant, which is one of the judgment debtors in the instant application, arising from suit 326. But the judgment creditor, the plaintiffs herein in suit 326 are not competent to file garnishee proceedings to attach the said monies, because the court itself cannot, by virtue of the garnishee action, be the subject of the court proceedings. The money paid into court cannot be attached under a garnishee order. Thus the judgment creditor may instead apply to court by notice of application for an order that the monies or so much thereof to be sufficient to satisfy the judgment.

[13] It is in essence and substance a form of execution of judgment, where the application is being brought before the court by the judgment creditor, being the party who is entitled to file the same, for the purpose of executing and satisfying the judgment granted to the plaintiffs for their benefit, as clearly contemplated in O. 49 r. 9.

[14] I observe that in its opposition to this application, the second defendant contends that the plaintiffs should have agreed to the second defendant's own application for payment out of court in the Ipoh High Court which had been filed earlier in time. The application by the second defendant is one that is specified to be on the basis of O. 90 r. 9 of the RC 2012. The provisions of O. 90 r. 9 govern procedures for payment out of court generally. It reads as follows:

9. Payment out of funds in Court (O. 90 r. 9)

(1) Money paid under Order 14 or 23 shall be paid out on a direction to the Accountant General in form (b) in Form 129.

(2) In all other cases the person entitled to withdraw the funds shall lodge with the Accountant General a copy of the order authorising withdrawal, and the Accountant General shall act in accordance with such order.

(3) When an order directs any sums to be ascertained by the certificate of the Registrar, both the order and the certificate in form (c) in Form 129 shall be sent to the Accountant General.

(4) When an order directs payment out of a fund in Court of any costs directed to be taxed, the Registrar shall state in his certificate, the name and address of the person to whom such costs are payable.

The True Nature Of The Defendants' Objection Herein And Of Its Application In Ipoh High Court

[15] The argument of the second defendant is that it is seeking to regulate the payment of the monies out of court pending the disposal of their appeals against, among others, the decision of this court in suit 326. As was made clear at the hearing of this application, the draft consent order made available to the court in respect of the second defendant's application at the Ipoh High Court (referred to as "encl. RF3") was for the monies be paid out to the respective solicitors for the parties, with RM32,000,000 be paid out to the solicitors for the plaintiffs, and for this instant application before me (encl. 90) be withdrawn.

[16] However, it is equally plain that the draft consent order proposed by the second defendant herein would not achieve what the plaintiffs seek to do in this encl. 90, which is simply to execute judgment granted in their favour. I say this primarily because of the following two clauses in the draft consent order proposed by the defendants:

> (2) the aforesaid respective sums paid to Messrs Logan Sabapathy & Co and Messrs Ng Choo Beng R. Naidu & Partners be placed in an interest bearing account **pending disposal of the Pending Appeals**;
>
> (3) the said Messrs Logan Sabapathy & Co and the said Messrs Ng Choo Beng R. Naidu & Partners are to only deal with the respective sums **upon further Order of Court upon the final disposal of the Pending Appeals**. (emphasis added)

[17] It is as clear as daylight that for all intents and purposes, the plaintiffs cannot be said to be able to execute judgment because the monies, to the extent they are entitled to pursuant to the judgment in suit 326, would under the terms of the consent order, be placed in their solicitors' account pending the disposal of the appeals, including against the decision in suit 326.

[18] This, in my view, is quite clearly an attempt by the defendants to achieve a stay of the execution of the judgment in suit 326 by the backdoor. When in fact there is no stay against, among others, the judgment in suit 326. There was not even any application filed for stay by the defendants. Thus this proposal as envisaged by the terms of the draft consent order is one that the plaintiffs could legitimately refuse. The court too cannot assist a party who is content to pursue its rights in a fashion that borders on an abuse of the court's process.

[19] The plaintiffs' argument that encl. RF3 and the draft consent order are in truth a disguise for a stay of execution under a purported application pursuant to O. 90 r. 9 is therefore certainly not without merit. It appears abundantly clear that given the timing of the application in the Ipoh High Court, and considering the absence of a stay, which the defendants did not bother applying, the second defendant now seeks to withdraw the monies in court and to pre-empt and prevent the plaintiffs from executing the judgment validly granted to the plaintiffs which the defendants, the second defendant included, must no doubt abide by.

[20] Yet the defendants are already bound by the judgment in suit 326. It is after all trite law that orders and judgments of the court must be treated with respect and require strict obedience, until and unless set aside (see, for example, the Supreme Court decision in *Wee Choo Keong v. MBf Holdings Bhd & Anor And Another Appeal* [1993] 3 CLJ 210; [1993] 2 MLJ 217). The defendants have however not satisfied the judgment by making payment of the judgment sum despite the absence of any stay.

[21] The defendants' application in encl. RF3 and their draft consent order are conveniently fashioned to be cloaked under the guise of the general provisions of O. 90 r. 9 which in truth seeks to achieve the effects of a stay of the execution of the judgment against them in suit 326. That is not acceptable. For this reason alone, the defendants' resistance against this application by the plaintiffs under O. 49 r. 9 cannot be sustained.

Proper Exercise Of Right Of Judgment Creditor

[22] There is, after all, no dispute that the monies in court are the property of the second defendant. It was paid into court by the plaintiffs pursuant to a direction of the court in suit 109 to complete a purchase transaction by the plaintiffs which the defendants then continued to resist. There was thus nothing inconsistent about the plaintiffs' solicitors letter of 23 May 2017 (notwithstanding the fact that this was before the pronouncement of the judgment in suit 326 several days after) which stated that the RM49,000,000 "absolutely belongs" to the second defendant, when measured against their

present action in filing encl. 90 seeking the payment out *vis-a-vis* the same RM49,000,000, the sum to satisfy the fruits of their litigation that is the judgment in suit 326.

[23] The plaintiffs are as such merely exercising their rights to have the judgment granted in their favour satisfied. And there is sufficient money in court which stands to the credit of the second defendant, being the judgment debtor, for the plaintiffs to 'attach' under O. 49 r. 9. The plaintiffs' pursuit of the instant application to execute the judgment by resorting to O. 49 r. 9 is entirely a valid and proper exercise of its right as a judgment creditor.

Is This Court The Correct Forum For The Payment Out Application?

[24] The defendants however raised a pertinent question as to the correct forum for the plaintiffs to make the application under O. 49 r. 9. The second defendant argued that as the sum of RM49,000,000 had been paid into court, specifically, the Ipoh High Court pursuant to the order of court dated 17 February 2015 granted in suit 109, the monies cannot be construed as 'money standing to the credit of the judgment debtor' (erroneously referred to as 'money standing to the credit of the judgment creditor' in the written submissions of the second defendant), enforceable by way of O. 49 r. 9 in this action before me, because the said sum should remain subject to the direction of the Ipoh High Court.

[25] This argument is at first blush, not unattractive. According to the second defendant, its position is supported by a recent decision of the English Court of Appeal in *Emmott v. Michael Wilson & Partners Ltd* [2017] EWCA Civ 367 which was referred to the commentary of the English White Book on Chapter 72.10 of the Rules of Supreme Court (equivalent to our O. 49 r. 9 of the RC 2012) as follows:

> It has been held (unreported) that money paid into court in other pending proceedings is not 'money standing to the credit of the judgment debtor in court' as it remains subject to the direction of the court in those proceedings.

[26] I do not, however, think the objection taken by the defendants herein is meritorious. In the first place, it cannot be denied that there is no pending proceedings in suit 109 but for the application by the second defendant in encl. RF3 for its proposal of payment out of court. The passage relied on by the defendants from the case of *Emmott v. Michael Wilson & Partners Ltd* itself refers to 'money paid into court in other pending proceedings'. Order 90 r. 8 which regulates applications on transfers and payments of funds out of court also provides in para. (2), that such applications must in respect of a pending cause or matter, be by way of a notice of application. Yet the second defendant filed the notice of application in suit 109 when clearly there was nothing pending.

[27] Further, as the written submissions of the defendants themselves highlighted, the judgment of Simmons LJ in that case additionally observed that although the court is not bound to make an order under the rule in favour of a judgment creditor, it is more importantly entitled to exercise its discretion on whether or not to make an order for the judgment creditor.

[28] Indeed, the case of *Emmott v. Michael Wilson & Partners Ltd* itself supports the position of the plaintiffs for it was also stated thus:

> … However where there is money in court standing to the credit of the judgment debtor Part 72.10 provides a simple and alternative procedure which a judgment creditor can use.
>
> Although Part 72.2 uses the word 'may' which imports a general discretion, the circumstances in which the order is likely to be refused are limited, see for example, the editorial comment in relation to charging orders at S73. 4.2 of the White Book 2017 …
>
> This provision simply prescribes how an application is to be made where a judgment creditor seeks to obtain an order for payment of a sum owed by a judgment debtor from sums in court …

[29] These pronouncements give emphasis on the discretion of the court to grant such an order in respect of this straightforward and simple procedure enacted to assist a judgment creditor to seek satisfaction of judgments in their favour. It is not the intention of the law, in its application of O. 49 r. 9 to complicate what is essentially a legitimate effort by a judgment creditor to enforce a judgment of the court.

[30] This case before me is thus no exception. In my view, O. 49 r. 9 is clearly one that can justifiably be invoked by the plaintiffs herein to seek the satisfaction of the judgment granted in suit 326 (given the refusal of the second defendant to make payment to the plaintiffs on the basis of the judgment), from the monies belonging to the judgment debtor now in court by virtue of the payment into court in suit 109, by applying for an order of this court authorising the payment out of the same, out of the monies paid into the court in suit 109.

[31] I am therefore of the view that the application herein is correctly filed before this court for this is also the court which granted judgment in suit 326 which is now sought to be executed by the plaintiffs who secured the judgment in the same suit 326. Any application for an attachment of monies paid into a different court may rightly be made to the court which granted judgment that gives rise to the execution thereof for it establishes, by virtue of the verdict, the status of a judgment creditor for the winning party who then becomes entitled to have the judgment executed, if not earlier satisfied by the judgment debtor.

[32] In any event, it is in my view a valid legal proposition that there should not be any undue restrictions as to which court ought to have that jurisdiction under O. 49 r. 9 of the RC 2012. This is supported by the decision of the English Court of Appeal in *Brereton v. Edward* [1888] 21 QBD 488 which dealt with the corresponding rule under the English RSC where it was stated thus:

> I think the broad principle of law that we are now deciding is this – that any judge of the High Court has power, at the instance of a judgment creditor, to make an effectual order charging the judgment debtor upon sum of money standing to the credit of the judgment debtor in the name of the Paymaster-General in an action in the chancery division.

[33] This observation has common sense and judicial efficacy written all over it. After all, the context is one concerning the execution of judgments. It is not about the issue of a court being seized with the jurisdiction on matters properly instituted before it. This is one which concerns execution of judgment, and an exception to a garnishee proceedings under O. 49 of the RC 2012. Order 49 r. 9 itself does not stipulate that the application must be made at either the court where the monies have been paid into or the court which granted judgment. Either of the courts may grant the order of attachment in the form and substance provided for under O. 49 r. 9. An application under O. 49 r. 9 can thus be made in the court into which the money has been paid, or where the judgment giving rise to the right to execute the judgment is granted. Above all, there is no real prejudice to either party as to where the application should be filed. Furthermore, in all cases of payment out, including whether pursuant to O. 49 r. 9 relied on by the plaintiffs or O. 90 r. 9 referred to by the second defendant, appropriate notification ought to be made to the office of the Accountant General. It is also of relevance to note that the Form No. 98 of the RC 2012 which prescribes the format for an affidavit in support of garnishee order under O. 49 r. 2 employs words that contemplate that the application for garnishee is made in the court that grants the judgment. Thus in para. 1 it is stated "By a judgment (or order) of the court given in this action …"

[34] Here, it is, in any event, the same court which granted the judgment presently sought to be executed. Furthermore, as stated earlier, in this instant case before me, is are also nothing still pending before the Ipoh High Court in suit 109. That suit 109 has concluded. Even the appeals in respect of the supplementary orders granted post-judgment in the main suit 109 had been exhausted. And suit 109 itself is related to suit 326. The latter was filed as a result of among others, suit 109. The judgment in Suit 326 also takes into account the judicial decisions in suit 109. In the exercise of my discretion under O. 49 r. 9 of the RC 2012, considering the justice of the case, including

A the history of the litigation in suits 109 and 326 among others, an order that this court thinks just within the provisions of O. 49 r. 9 is one that grants the application of the plaintiffs in terms of their encl. 90.

Conclusion

B **[35]** Order 49 r. 9 is manifest in para. (4) in stating that the court hearing such an application may make such order with respect to the money in court as it thinks just. For the reasons that I have earlier discussed, it is my judgment that the plaintiffs have satisfactorily established their case for the payment out of court under O. 49 r. 9 in terms of their application in encl. 90. I therefore allow the same, with costs.

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